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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[ENTERED: JANUARY 8, 2010]

No. 08-41037

CORLINE ALLEN, Individually and on behalf of all others similarly situated; ALL PLAINTIFFS; LORENZO AGUIRRE; THEOTIS ANDERSON; GERARDO AVALOS; ET AL,

Plaintiffs-Appellants

v.

MCWANE INC.

Defendant-Appellee

Appeal from the United States District Court for the Eastern District of Texas

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Before JONES, Chief Judge, GARZA and STEWART, Circuit Judges.

CARL E. STEWART, Circuit Judge:

This collective action under the Fair Labor Standards Act ("FLSA"), on behalf of hourly employees of McWane, Inc. ("McWane"), sought payment for pre- and post-shift time spent donning and doffing protective gear. The district court granted summary judgment on the basis that at each plant there existed a custom or practice of not compensating pre- or post- shift time spent putting on and taking off protective gear. We AFFIRM.

I. FACTUAL AND PROCEDURAL BACKGROUND

McWane operates plants that manufacture cast iron pipe and fittings. The hourly employees at McWane's plants wear protective gear while at work, including hard hats, steel-toed boots, safety glasses, and ear plugs. This appeal involves hourly workers at ten McWane plants that operate under collective bargaining agreements ("CBAs"). Different CBAs govern each of the plants, and workers are employed subject to the terms of their respective CBA. Three of the plants operate under CBAs that expressly exclude compensation for pre- and post-shift donning and doffing of protective gear; the other seven CBAs

do not address pre- and post-shift time spent putting on and taking off protective gear.[1]

The workers at the plants are paid by the hour, based on shift or line time. Line time refers to the practice of measuring the shift as starting when the first item hits the processing line and ending as the last item leaves the processing line. None of McWane's employees at these plants have ever received compensation for pre- and post-shift changing time. Union representatives and the employees attest that they were not aware that the pre- and post-shift changing time was potentially compensable under the FLSA. Compensation for such time was never discussed in union meetings or in meetings between union representatives and McWane, including the meetings where the CBAs were negotiated.

Plaintiffs-appellants (collectively, "Allen") filed their collective claim against McWane, on behalf of over 2,100 McWane employees, under 29 U.S.C. §§ 207 and 216(b) of the FLSA. They sought compensation for time spent putting on and taking off gear before and after their scheduled shifts. The

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[1] Those seven plants whose CBAs do not address compensation for pre- and post-shift donning and doffing are:

(1) Tyler Pipe-Texas (Tyler, TX)
(2) Union Foundry Company (Anniston, AL)
(3) M & H Valve Company (Anniston, AL)
(4) Kennedy Valve Company (Elmira, NY)
(5) McWane Cast Iron Pipe Company (Birmingham, AL)
(6) Clow Valve Company (Oskaloosa, IA)
(7) Clow Water Systems Company (Coshocton, OH)

district court conditionally certified the case as a collective action. McWane moved for summary judgment, and the motion was referred to the magistrate judge. Relying on *Anderson v. Cagle's, Inc.*, 488 F.3d 945 (11th Cir. 2007), the magistrate judge recommended that summary judgment should be granted because § 203(o) of the FLSA was applicable. Allen filed objections to the magistrate's recommendations. The district court considered and overruled Allen's objections, adopted the magistrate judge's recommendations, and granted summary judgment in favor of McWane. Allen timely appealed.

II. DISCUSSION

This court reviews a district court's grant of summary judgment *de novo*, applying the same standards as the district court. *McGavock v. City of Water Valley, Miss.*, 452 F.3d 423, 424 (5th Cir. 2006). Summary judgment is warranted when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party has the burden of demonstrating that there are no genuine issues of material fact in dispute. *Harvill v. Westward Commc'ns, L.L.C.*, 433 F.3d 428, 433 (5th Cir. 2005). "This Court resolves any doubts and draws all reasonable inferences in favor of the nonmoving party." *United States ex rel. Longhi v. United States*, 575 F.3d 458, 465 (5th Cir. 2009). "Additionally, we construe the FLSA liberally in favor of employees ..." *McGavock*, 452 F.3d at 424.

This appeal requires construction of § 203(o) of the FLSA, which allows for the exclusion from the computation of hours worked, under certain circumstances, of time spent changing clothes at the beginning or end of each workday. The controlling issue is whether a § 203(o) "custom or practice" of non-compensation for such time existed. In addition, the parties dispute who has the burden of proof under § 203(o) and whether material issues of fact exist.

A. Custom or Practice of Non-Compensation under § 203(o)

"The Fair Labor Standards Act of [1938] establishes the general rule that employees must receive overtime compensation at one and one-half times the regular rate for hours worked in excess of 40 hours during a seven-day workweek." *McGavock*, 452 F.3d at 423-24; 29 U.S.C. § 207(a). Section 207(a) states:

> Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions
>
> > (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed

> in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

"Under 29 U.S.C. § 203(o), the time spent changing clothes is to be excluded from the measured working time [for purposes of § 207] if it has been excluded by custom or practice under a bona fide collective-bargaining agreement." *Bejil v. Ethicon, Inc.*, 269 F.3d 477, 479 (5th Cir. 2001); § 203(o). Section 203(o) states:

> Hours Worked.--In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide

collective-bargaining agreement applicable to the particular employee.[2]

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[2] The legislative history of § 203(o) is particularly helpful here, as noted by the Eleventh Circuit in *Anderson v. Cagle's*:

> In 1947, approximately nine years after the FLSA was enacted to eliminate "conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers," 29 U.S.C. § 202 (2000), Congress passed the Portal-to-Portal Act, 29 U.S.C. §§ 251-262 (2000). The Portal-to-Portal Act aimed to countermand judicial interpretations of the FLSA that Congress found to evidence a
>
> > disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others ...; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive

> establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; [and] (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created.
>
> 29 U.S.C. § 251 (2000).

Congress's efforts to curtail employee-protective interpretations of the FLSA continued when the FLSA was amended two years later to add, among other things, what would become § 203(o). As the sponsor of the relevant amendment explained to fellow representatives, the purpose of the amendment was to "avoid [ ] another series of incidents which led to the portal-to-portal legislation." 95 Cong. Rec. 11,433 (daily ed. Aug. 10, 1949) (comments of Rep. Herter). Essentially, he explained, the amendment would strengthen

Allen argues that here the facts do not establish a "custom or practice under a bona fide collective-bargaining agreement" that would make changing time non-compensable.[3] Allen claims that compensation for the pre- and post-shift changing time is a pre-existing right under the FLSA, subject to exclusion only if it has been affirmatively bargained away in CBA negotiations; *i.e.*, negotiation of whether to pay for pre- and post-shift changing time must be shown before the court may conclude that there was a custom or practice as provided in § 203(o). According to Allen, there has been no acquiescence or waiver here because the union representatives did not have knowledge of the right to compensation for this pre- and post-shift changing time, nor any knowledge of or acquiescence to a policy of nonpayment for that time.

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the employer-protective Portal-to-Portal Act by closing a "loophole" therein. *Id.*

488 F.3d 945, 957-58 (11th Cir. 2007).

[3] In *Bejil v. Ethicon, Inc.*, this Court determined that protective gear constitutes "clothes" under § 203(o). 269 F.3d at 480 n.3. The parties here do not dispute that the term "changing clothes" in § 203(o) includes the putting on and taking off of protective gear. *See also* Dep't of Labor, Wage & Hour Opinion Letter, FLSA2007-10 (May 14, 2007) (stating that "'changing clothes' referred to in section 3(o) applies to putting on and taking off the protective safety equipment typically worn by employees in the meat packing industry."); Dep't of Labor, Wage & Hour Opinion Letter, FLSA2002-2 (June 6, 2002) ("we interpret 'clothes' under section 3(o) to include items worn on the body for covering, protection, or sanitation . . .")

This court addressed a related issue in *Bejil*: whether employees had a right to compensation for changing time where the union and the employer had discussed that very question during CBA negotiations, but the CBA ultimately remained silent on the matter. 269 F.3d at 480. We concluded that such silence in the CBA, after the parties negotiated over the matter, resulted in a "custom or practice" of not compensating the employees for the changing time, and therefore § 203(o) barred claims for back wages for such time. *Id.* Here, unlike in *Bejil*, there was no discussion of whether McWane should compensate the Allen plaintiffs for such clothes changing time.

The Third and Eleventh Circuits have considered the specific question of whether § 203(o) requires the employees and employer to have discussed the issue of compensation for pre- and post-shift changing time, where the CBA is silent on the issue, in order to find that a custom or practice of nonpayment existed pursuant to a CBA. The Third and Eleventh Circuits concluded that it was not necessary for the issue to have been raised in negotiations. *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 958-59 (11th Cir. 2007); *Turner v. City of Philadelphia*, 262 F.3d 222, 226 (3d Cir. 2001).

Turner presented the following uncontested facts: (1) Philadelphia had not compensated corrections officers for uniform change time for over 30 years; (2) every CBA between Philadelphia and the officers had been silent as to compensation for change time; (3) the union president proposed at labor management meetings with Philadelphia's

Labor Relations Administrator that change time be made compensable, but the union did not make this request in formal CBA negotiations; (4) the union did, however, ask for and receive a uniform maintenance allowance; and (5) the union never filed a grievance or demanded arbitration based on the non-compensability of change time. *Turner*, 262 F.3d at 225.

The *Turner* plaintiffs made an argument similar to the one articulated by Allen, that "a 'custom or practice' of non-compensability cannot come into being unless (1) the issue of compensability is specifically raised in formal collective bargaining negotiations, and then (2) dropped by the negotiators." *Id.* at 226. Rejecting this approach, the Third Circuit held that the plaintiffs and their union had acquiesced to the municipal government's thirty-year policy of not compensating for changing time. *Id.* at 227. The court explained:

> We think that plaintiffs interpret the phrase "custom or practice under a bona fide collective-bargaining agreement" too narrowly, placing undue emphasis on the clause "under a bona fide collective-bargaining agreement" while virtually reading the clause "custom or practice" out of § 203(o). In essence, plaintiffs construe "custom or practice under a bona fide collective-bargaining agreement" as "custom or practice established through formal collective bargaining negotiations." To the

> contrary, we view the phrase as simply restating the well-established principle of labor law that a particular custom or practice can become an implied term of a labor agreement through a prolonged period of acquiescence.

Id. at 226. The *Turner* court also rejected the argument that the plaintiffs had an antecedent right to payment under the FLSA such that they could not acquiesce to non-compensation without the issue being negotiated, noting that § 203(o) itself defines what work time is encompassed by that right to payment. *Id.* at 226-27.

In *Anderson*, the employer had not compensated the employees for time spent donning and doffing protective gear for approximately ten years. 488 F.3d at 958. Additionally, the court assumed for purposes of its decision that every CBA during the relevant time period had been silent as to compensation for changing time, and assumed that the parties had never discussed the policy. *Id.* at 958. The *Anderson* court followed *Turner*, also rejecting the argument that a custom or practice under § 203(o) cannot exist unless the parties negotiated about the non-compensation policy. *Id.* at 958-59. "Relying again on a common sense understanding of the statute's language, we believe that a policy concerning compensation . . . for clothes changing, written or unwritten, in force or effect at the time a CBA was executed satisfies § 203(o)'s requirement of a 'custom or practice under a bona fide' CBA." *Id.* "Absence of negotiations cannot in this instance equate to ignorance of the policy.

Rather, it demonstrates acquiescence to it." *Id.* at 959.

The Eleventh Circuit noted that the issue in *Anderson* was not controlled by the Fifth Circuit's decision in *Hoover v. Wyandotte Chemicals Corporation*, 455 F.2d 387 (5th Cir. 1972). In *Hoover*, another action to recover overtime pay under the FLSA, this court held that employees were not entitled to additional compensation for the extra eight to ten minutes of clothes changing time that they requested during collective bargaining negotiations, but which was not incorporated into the executed CBA. *Id.* at 388. The custom and practice of the employer for approximately fifteen years had been to pay for fifteen minutes of changing time. During the most recent CBA negotiations, pay for 23-25 minutes of time had been requested but not adopted. *Hoover* held that the request did not change the custom or practice, which was to pay only for fifteen minutes of changing time. *Id.* at 389. Although the employer had agreed to pay for changing time, where the employees raised the issue during CBA negotiations but there was no change in practice by the employer or change to the CBA on the issue, the relevant custom of non-payment for clothes changing time over fifteen minutes remained unaltered.

Allen both criticizes the reasoning of *Turner* and *Anderson* and tries to distinguish them. Allen observes that in *Anderson* the plaintiffs did not contend that they lacked notice of the relevant compensation policy, whereas here the employees and their union representatives were unaware of the

potential for compensation under the FLSA. 488 F.3d at 959. However, neither *Turner* nor *Anderson* address the employees' awareness of the law, much less find it to be a controlling factor in their holding. *Anderson* merely observed that the plaintiffs were aware that the company had a policy of not paying for pre- and post-shift clothes changing time. *Id.* Similar facts were present in *Turner*. 262 F.3d at 225. Both courts concluded that silence by the employees and their union as to the non-compensability of this time when the CBAs were executed meant that a custom or practice of nonpayment was established pursuant to a CBA, and thus the time was not to be calculated as "hours worked" under § 203(o).

Allen relies heavily on the reasoning employed by *Kassa v. Kerry, Inc.*, 487 F. Supp. 2d 1063, 1071 (D. Minn. 2007). In *Kassa*, the defendant moved for summary judgment based on § 203(o). The court voiced its agreement with *Turner*, and determined that § 203(o) may apply even where non-payment for changing time was never raised in negotiations. The court then identified three elements as essential to determine the existence of a "custom or practice" under § 203(o): time, knowledge, and acquiescence. *Id.* at 1070-71 (relying on *Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union*, 396 U.S. 142, 154 (1969)). *Kassa* assigned the burden to the defendant to show that "its policy of non-compensation for clothes-changing time lasted for a sufficiently long time, with sufficient knowledge and acquiescence by [the] employees, that the policy became an implicit term—a 'custom or practice'—under the CBA." *Id.* at 1071. In *Kassa*, the record

established that the non-payment by defendant had occurred for six years and the union had never complained about non-payment when executing the CBA. *Id.* The district court found this insufficient as a matter of law to establish a custom or practice, and denied summary judgment.

Allen also relies on the Supreme Court's statement in *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 740 (1981), that "FLSA rights cannot be abridged by contract or otherwise waived . . . ." *Barrentine* addressed whether employees at a union-organized plant operating under a CBA could sue their employer for violations of the minimum wage provisions of the FLSA. The CBA in *Barrentine* required the employees to submit the claim to a grievance committee; when they did so, the committee rejected their claims. The Court held that the right to sue for the violation of the FLSA could not be abridged or waived. *Id.* at 740. There is a significant distinction between the minimum wage provision at issue in *Barrentine* and the application of § 203(o) in the instant case: the FLSA rights at issue in *Barrentine* are independent of the collective bargaining process. *Id.* at 745. By contrast, under § 203(o) the right to be paid for pre- or post-shift changing time may be abridged by contract—a bona fide CBA. *See also Livadas v. Bradshaw*, 512 U.S. 107, 131-32 (1994) (addressing question of meaningful bargaining under the National Labor Relations Act, referring to § 203(o) of the FLSA as an example of a "narrowly drawn opt-out provision," and noting employees have full protection of the minium standard "absent any agreement for something different").

We are persuaded by the reasoning of the Third and Eleventh Circuits, and join them in holding that even when negotiations never included the issue of non-compensation for changing time, a policy of non-compensation for changing time that has been in effect for a prolonged period of time, and that was in effect at the time a CBA was executed, satisfies § 203(o)'s requirement of "a custom or practice under a bona fide" CBA. *See Anderson*, 488 F.3d at 958-59 (policy of non-compensation had been in place for at least ten years); *Turner*, 262 F.3d at 226 (policy of non-compensation had been in place for thirty years). In such instances, regardless of whether the parties negotiated regarding compensation for changing time, acquiescence of the employees may be inferred. By contrast, where there have been no relevant negotiations and the facts do not demonstrate that a policy of non-compensation for changing time has been in effect for a prolonged period of time, other evidence of knowledge and acquiescence by the employees will be required. *See Gatewood v. Koch Foods of Miss.*, 569 F. Supp. 2d 687, 698-700 (S.D. Miss. 2008) (holding that even in the absence of a long-standing tradition of non-compensation or negotiations for compensation of time spent changing clothes, "when employees and union representatives are conclusively aware of the facts surrounding compensation policies for changing clothes at the beginning and end of each workday, and reach an agreement under a CBA that does not compensate employees for the time, a 'practice' exists

under the CBA sufficient to invoke the § 203(o) defense").[4]

Thus, as long as there was a company policy of non-compensation for time spent changing for a prolonged period of time—allowing the court to infer that the union had knowledge of and acquiesced to the employer's policy—and a CBA existed, the parties need not have explicitly discussed such compensation when negotiating the CBA. McWane "only need prove that the parties had a 'custom or practice' of non-compensation under the agreement." *Bejil*, 269 F.3d at 479. It is undisputed that McWane has never compensated its employees for changing time, going as far back as 1965. After more than forty years of non-compensation, we may safely infer that McWane's employees had knowledge of and acquiesced to the policy of non-compensation. Therefore, we conclude that McWane has demonstrated a "custom" of non-compensation for changing time.

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[4] *Arcadi v. Nestle Food Corp.*, 38 F.3d 672 (2d Cir. 1994) first drew the distinction between those situations requiring evidence of acquiescence—such as th[o]rough negotiations, for example—and those that do not. In *Arcadi*, the Second Circuit distinguished between "custom" and "practice" under § 203(o). *Id.* at 675. "Custom" relates to the past; as in *Turner* and *Anderson*, a court looks for "an ongoing understanding with some continuity." 38 F.3d at 672. Thus, a "custom," in and of itself, demonstrates acquiescence. Regardless of past policies, however, a "practice" can exist if the parties "negotiate over an issue and have an understanding that resolves it" or if there is evidence of an unwritten agreement, even if the issue is not expressly addressed in the CBA. *Id.*

B. Burden of Proof on the Applicability of § 203(o)

Allen urges the court to characterize § 203(o) as an exemption, and argues that the application of an exemption under the FLSA is an affirmative defense for which the defendant has the burden of proof. Allen relies on *Kassa*'s holding that it is the defendant's burden, and on Supreme Court precedent indicating that exemptions are to be narrowly construed against the employer. *See Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *Kassa*, 487 F. Supp. 2d at 1071.

The statute, however, demonstrates that § 203 is a list of definitions and subsection (o) addresses how to define and calculate "hours worked," in contrast to § 213, which is titled "Exemptions." 29 U.S.C. § 203(o); *see also Anderson*, 488 F.3d at 957 (noting that § 203 provides a list of definitions, but § 213 is titled "Exemptions," and concluding that § 203(o) is not an affirmative defense); *Turner*, 262 F.3d at 225-26 (plaintiffs had burden of persuasion as to whether or not a custom or practice under § 203(o) existed). In addition, the "exemptions" the Supreme Court refers to as affirmative defenses to the FLSA all "relate[ ] to the total exclusion of a particular worker or workers from certain FLSA protections[,]" not "to the exclusion of only some *activities* from FLSA." *Adams v. United States*, 471 F.3d 1321, 1325-26 (Fed. Cir. 2006).

The only circuit court holding § 203(o) to be an exemption is the Ninth Circuit. *Alvarez v. IBP, Inc.*, 339 F.3d 894, 905 (9th Cir. 2003), *aff'd on other*

grounds, *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005) (concluding that § 203(o) constitutes an "exemption" from FLSA requirements and is an affirmative defense on which the defendant bears the burden). However, in *Anderson* the Eleventh Circuit persuasively critiqued the Ninth Circuit's characterization of § 203(o) as an exemption. *Anderson*, 488 F. 3d at 957. The *Anderson* court noted that all the cases on which the Ninth Circuit relied concerned § 213 of the FLSA, which is titled "Exemptions." *Id.* The court further observed that "[h]ad Congress sought to bestow upon § 203(o) the same status as the exemptions set forth in § 213, it easily could have amended § 213 instead of § 203, which is titled, not coincidentally, 'Definitions.'" *Id.* Beyond repeating criticism of the reasoning in *Anderson*, Allen does not offer further argument as to why § 203(o) is an affirmative defense allocating the burden of proof to McWane.

Thus, here Allen had the burden of proof as to whether or not a custom or practice under § 203(o) existed. *See Adams*, 471 F.3d at 1326 ("An employee who brings suit . . . for unpaid minimum wages or unpaid overtime compensation . . . has the burden of proving that he performed work for which he was not properly compensated.") (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686-87 (1946)). Once McWane satisfied its summary judgment obligation of showing that Allen had failed to support some essential element of its case, Allen then had the burden of showing that the clothes-changing "does not fall into the set of activities excluded from the definition of" hours worked by section 203(o). *Id.* Although Allen argues that

McWane cannot prevail by merely submitting evidence of the number of years that its policy of non-payment has been in effect, "[s]ince the burden of proof is on [Allen], we reject [the] argument that summary judgment to [McWane] was improper because [McWane] presented minimal evidence." *Id.*

Allen also claims that the declarations presented from employees establish that they did not knowingly acquiesce to a practice of non-payment for changing time, and that those declarations require reversal of summary judgment. The declarations, however, demonstrate only that the employees and their union representatives were unaware of their legal rights under the FLSA—not that they were unaware that they were not being compensated for the time. *See, e.g.*, *Gatewood*, 569 F. Supp. 2d at 701 (when employees and union representatives are "aware of *the facts* surrounding compensation policies for changing clothes . . . a 'practice' exists under the CBA sufficient to invoke the § 203(o) defense.") (emphasis added). While evidence of the employees and their union representatives' ignorance of the fact of non-compensation could create a genuine issue of material fact, no such evidence has been proffered by Allen. The declarations are irrelevant because they do not change the facts established by McWane that (a) McWane did not pay for such time over a prolonged period, allowing an inference of knowledge and acquiescence, and (b) bona fide CBAs existed.

III. CONCLUSION

We adopt the reasoning of the Third and Eleventh Circuits and hold that negotiation is not necessary in order to find that a "custom or practice" exists under § 203(o). We further hold that § 203(o) is not an affirmative defense. Therefore, the judgment of the district court is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[ENTERED: JANUARY 8, 2010]

No. 08-41037

D.C. Docket No. 2:06-CV-158

CORLINE ALLEN, Individually and on behalf of all others similarly situated; ALL PLAINTIFFS; LORENZO AGUIRRE; THEOTIS ANDERSON; GERARDO AVALOS; ET AL,

Plaintiffs - Appellants

v.

MCWANE INC,

Defendant - Appellee

Appeal from the United States District Court for the Eastern District of Texas, Marshall

Before JONES, Chief Judge, GARZA and STEWART, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that appellants pay to appellee the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE:

A True Copy
Attest

Clerk, U.S. Court of Appeals, Fifth Circuit

By: _____
Deputy

New Orleans, Louisiana

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

[ENTERED: SEPTEMBER 24, 2008]

CORLINE ALLEN, ET AL.	§	
	§	
v.	§	CIVIL ACTION NO.
	§	2:06-CV-158
MCWANE, INC.	§	

ORDER AND RULE 54(b) JUDGMENT

The above-titled and numbered civil action was heretofore referred to United States Magistrate Judge Chad Everingham pursuant to 28 U.S.C. § 636. The report of the Magistrate Judge, which contains his proposed findings of fact and recommendation for the disposition of the defendant's first motion (#90) for summary judgment, has been presented for consideration. The plaintiffs have filed an objection to Judge Everingham's report and recommendation. The undersigned has reviewed Judge Everingham's report and recommendation and the plaintiffs' objections. The undersigned overrules the plaintiffs' objections and adopts the findings and conclusions contained in Judge Everingham's report and recommendation.

The defendant's first motion for summary judgment (#90) is granted.

The plaintiffs' motion to enter judgment under Rule 54(b) is granted. There is no just reason for delay, and the court renders judgment dismissing all of the opt-in plaintiffs' claims for overtime compensation for time spent donning and doffing protective gear at the beginning and end of the plaintiffs' shifts at the defendant's unionized facilities. The balance of this case is administratively closed. All other pending motions are denied as moot, without prejudice to re-urging should the case be re-opened in the future.

SIGNED this 24th day of September, 2008.

/s/
T. JOHN WARD
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS MARSHALL DIVISION

[ENTERED: AUGUST 25, 2008]

CORLINE ALLEN, ET AL.	§	
	§	
vs.	§	CIVIL ACTION NO.
	§	2:06-CV-158
MCWANE, INC.	§	

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

I. Introduction

The Fair Labor Standards Act ("FLSA") requires the payment of overtime compensation depending on the number of hours worked by an employee in a workweek. 29 U.S.C. § 207. One provision of the statute excludes from the computation of hours worked any time spent "changing clothes or washing" at the beginning or end of each work day if there exists either (1) express terms excluding such time in a collective bargaining agreement ("CBA") or (2) a custom or practice of non-compensation for such time under the CBA. 29 U.S.C. § 203(o). At issue in the defendant's first motion for summary judgment is whether a custom or practice of non-compensation exists in this case. Based on the summary judgment record, viewed in the light most favorable to the plaintiffs, the court concludes that such a custom or practice exists in this case. As such, the court recommends

the defendant's first motion for summary judgment (#90) be granted.

2. Facts and procedural posture

In this collective action brought under the FLSA, the court previously issued an order conditionally certifying a class of opt-in plaintiffs employed by the defendant. The action presently involves over 2200 plaintiffs from twelve different facilities of the defendant. The relevant time period covered by the certification order is September 11, 2003, to the present. Ten of the twelve facilities are unionized plants, but one such unionized facility had no opt-in plaintiffs who met the class definition. Thus, nine plants are the subject of the present motion.

Each of the defendant's unionized facilities employ hourly workers and operate subject to the terms of a CBA reached between the company and the union representing the hourly workers at each facility. The declarations submitted in support of the motion for summary judgment establish that CBAs are in place at the following facilities operated by the defendant (1) Clow Valve;[1] (2) Clow Water; (3) Kennedy Valve; (4) McWane Cast Iron Pipe Company; (5) M&H Valve Company; (6) Pacific

[1] The defendant's Clow Valve Division operates plants in Oksaloosa, IA, and Corona, CA. Only the Oksaloosa plant is unionized, and as such the employees of the Corona plant are not affected by this motion. Likewise, the defendant's Tyler Pipe Division has plants operating in Tyler, TX, Macungie, PA, and Marshfield, MO. Only the Tyler and Macungie plants are unionized, and as such the employees of the Marshfield plant are not affected by this motion.

States Cast Iron Pipe Company; (7) Tyler Pipe Company-Pennsylvania; (8) Tyler Pipe Company; and (9) Union Foundry Company.

The CBAs in effect in three of the defendant's plants specifically address the issue whether changing clothes is compensable. In each case, the CBAs, which have been in effect since (1) April 1, 2001, at the Tyler Pipe–Pennsylvania Plant; (2) March 26, 2005, at the Pacific States Cast Iron Pipe Company; and (3) July 2, 2006, at the Atlantic States Cast Iron Pipe Company, specifically exclude time spent changing clothes from the computation of hours worked by an employee. Plaintiffs' Response to Motion for Summary Judgment (#100) at 4.

In all of the other facilities, the CBAs are silent on the specific issue whether time spent changing clothes is compensable. It is not disputed, however, that each unionized facility has had a CBA in effect since at least 1997 (and in some cases even longer). It is also not disputed that employees in each unionized facility have not been paid for time

spent donning and doffing protective gear at the beginning and end of their work shifts.[2]

For purposes of this motion for summary judgment, the court accepts as true the statements made by the plaintiffs' witnesses in their declarations in response to the motion for summary judgment. In particular, the plaintiffs have tendered declarations signed by various union representatives and members which state that the respective unions did not know that pre- and post-shift clothes changing involving the donning and doffing of protective gear could be compensable under certain circumstances. Moreover, the court accepts as true the statements made in the declarations that the

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[2] The plaintiffs have objected to certain portions of the declarations of the various witnesses submitted in support of the defendant's motion for summary judgment. Specifically, the plaintiffs argue that these corporate witnesses do not have personal knowledge of, and therefore are not competent to testify concerning, events that occurred before they began working for the defendant. The court sustains these objections in part. The court finds that these witnesses, in their capacities as human resources/personnel/industrial relations officers, may competently testify as to (1) the dates of the various CBAs at each facility; (2) the contents of those CBAs, and (3) to the best of their knowledge, whether the facilities ever paid wages to the employees for time spent donning and doffing protective gear at the beginning and end of the employees' shifts. The court finds that these witnesses are not competent to testify whether the unions "acquiesced in the practice of non-compensation for such activities throughout the time [they have] represented" the employees. In sustaining this portion of the objection, the court observes that the plaintiffs have offered no evidence which contradicts the dates of the various CBAs, the contents of those CBAs, or whether the plaintiffs were ever compensated for time spent donning and doffing protective gear at the beginning or end of the employees' shifts.

issue of donning and doffing of protective gear was never discussed in union meetings or with management during the negotiations of the respective CBAs. Despite these statements, the court concludes that no genuine issues of material fact exist as to the application of § 203(o) and accordingly recommends that the motion for summary judgment be granted.

3. Summary judgment standard

Summary judgment is proper, pursuant to Rule 56(c), when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The movant bears the initial burden to demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. How the movant discharges this burden depends on the allocation of the respective burdens of proof. If the issue is one on which the non-movant bears the burden of proof, then the moving party may discharge its burden by pointing to the absence of evidence supporting an element of the non-movant's claim or defense. If the issue is one on which the movant bears the burden of proof, then the movant has an affirmative evidentiary obligation to demonstrate the absence of a genuine issue for trial. *See id.* at 322-24. Once the movant has discharged its summary judgment burden, the burden shifts to the non-movant to demonstrate the existence of a triable issue of fact. *Id.* at 324. In

evaluating the evidence, the court views all of the evidence in the light most favorable to the non-moving party. *Celotex Corp.*, 477 U.S. at 322-24. "[W]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal citations omitted). Bearing this standard in mind, the court now turns to the issues in the present case.

4. Discussion

The defendant asks for summary judgment with respect to the claims of all plaintiffs working in unionized facilities of the defendant pursuant to section 3(d) of the Fair Labor Standards Amendments of 1949, Pub. L. No. 81-393, § 3(d), 63 Stat. 910, 911 (1949) (codified at 29 U.S.C. § 203(o)(2000)). That statute provides:

> Hours Worked.–In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide

> collective-bargaining agreement applicable to the particular employee.

29 U.S.C. § 203(o). The Department of Labor ("DOL") recently issued an opinion confirming that "changing clothes" includes the "putting on and taking off of protective safety equipment typically worn by employees in the meat packing industry." Defendant's Motion for Summary Judgment, Ex. A, at 1. The type of protective safety equipment considered by the DOL included "mesh aprons, sleeves and gloves, plastic belly guards, arm guards and shin guards." *Id.*

In *Anderson v. Cagle's, Inc.*, 488 F.3d 945 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 2902 (2008), the court applied § 203(o) to the claims of plaintiffs who sued for overtime compensation for time spent donning and doffing protective gear. The court held that § 203(o)'s "changing clothes" provision covered the donning and doffing of protective gear and that a custom or policy existed at the company which denied compensation for such activity under a collective bargaining agreement. At bottom, the dispute in this case is whether to apply *Anderson* to this case. As such, the court considers closely the facts and holding of that decision.

In *Anderson*, the plaintiffs were production workers in a chicken plant. They sought compensation for the time spent, pre-shift and post-shift, donning and doffing protective clothing that included smocks, hair nets, hearing protection and gloves. *Anderson*, 488 F.3d at 949. The district court noted that some employees were also required to

wear plastic arm guards, steel mesh gloves, bump hats, rain suits, and heavy rubber gloves. *Anderson v. Cagle's Inc.*, No. 1:00-CV-166, slip op. at 10 (M.D. Ga. Dec. 8, 2005). The Eleventh Circuit viewed the protective equipment worn by the employees as "clothing" in view of the DOL's opinion letter and a dictionary, which defined clothing to include "all garments and accessories worn by a person at one time." *Anderson*, 488 F.3d at 955. So viewed, the *Anderson* court concluded that the plaintiffs' protective gear was clothing within the meaning of § 203(o).[3]

Having concluded that the plaintiffs were seeking compensation for "changing clothes" under § 203(o), the Eleventh Circuit then turned to the question whether the plaintiffs' claims were barred because there was a "custom or practice" under a bona fide collective bargaining agreement of not paying employees for time spent changing in and out of protective equipment and clothing. The court considered collective bargaining agreements executed by the union and the employer in 1997, 2000, and 2003, which were in effect during the relevant time period. The plaintiffs in *Anderson* argued that the parties to the CBAs never discussed the issue whether the employees should be compensated for donning and doffing the clothing at issue in the case. As such, the plaintiffs sought to preclude the application of § 203(o) by arguing that "a custom or practice under a collective-bargaining

[3] The Fifth Circuit has held that lab coats, hair covers, facial hair covers and shoes constitute "clothing" within the meaning of § 203(o). *Bejil v. Ethicon, Inc.*, 269 F.3d 477, 479 (5th Cir. 2001).

agreement of not compensating employees for changing clothes or washing cannot arise absent some actual negotiating or agreement between the union and employer on the subject." *Anderson*, 488 F.3d at 958.

The Eleventh Circuit squarely rejected this argument. In reaching its decision, the court assumed that the relevant CBAs never addressed the compensation policy with respect to clothes changing, and that the parties to the relevant CBAs never discussed the policy. *Id.* Nevertheless, the court held:

> relying again on a common sense understanding of the statute's language, we believe that a policy concerning compensation (or noncompensation, as the case maybe) for clothes changing, written or unwritten, in force or effect at the time a CBA was executed satisfies § 203(o)'s requirement of a "custom or practice under a bona fide CBA."

Id. at 958-59.

The court rejected the plaintiffs' position that a custom or policy could not exist absent a history of negotiations between the union and the employer. The court stated that "absence of negotiations cannot in this instance equate to ignorance of the policy. Rather, it demonstrates acquiescence to it." *Id.* at 959. In reaching its conclusion, the court observed that the Third Circuit had reached a consistent

holding in *Turner v. City of Philadelphia*, 262 F.3d 222, 225-27 (3d Cir. 2001)(rejecting the argument that formal collective bargaining negotiations constitute a prerequisite to the application of § 203(o)). Consequently, the court held that the plaintiffs' overtime claims were barred by § 203(o).

The panel in *Anderson* was bound by prior Fifth Circuit precedent on the subject, including *Hoover v. Wyandotte Chems. Corp.*, 455 F.2d 387, 389 (5th Cir. 1972). *See Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981)(en banc)(adopting as binding precedent all decisions of the former Fifth Circuit handed down prior to close of business on September 30, 1981). The plaintiffs in *Anderson* pointed to *Hoover* and urged that *Hoover* required actual negotiations before a custom or practice could exist. The court rejected this reading of *Hoover*, stating that the case simply noted a history of bargaining as evidence of a custom or practice. *Anderson*, 488 F.2d at 959.

In the present case, the plaintiffs concede that the donning and doffing of protective gear constitutes "changing clothes" within the meaning of § 203(o). Plaintiffs' Response to Motion for Summary Judgment, at 4. Thus, the sole issue to be decided is whether a custom or policy of non-payment exists with respect to those plaintiffs covered by CBAs that are silent on the subject of compensation for changing clothes. The plaintiffs argue that *Anderson* is wrongly decided and that the Fifth Circuit requires the union to "affirmatively acquiesce" to the non-payment for changing clothes. In other words, the failure of a CBA to address the issue is not

enough. Under the plaintiffs' theory, the union and the employer must actually raise the issue in negotiations before a custom or practice exists under § 203(o).

The plaintiffs have not cited, and the court's research has not located, any decisions from the Fifth Circuit that deny the application of § 203(o) under the present circumstances. Moreover, the holdings of the Fifth Circuit cases cited by the plaintiffs do not require the union and the employer to discuss a particular issue as a predicate to the application of § 203(o). It is true that in *Hoover* and *Bejil*, the unions representing the plaintiffs affirmatively discussed the compensation policy regarding change time in the collective-bargaining process. *Hoover*, 455 F.3d at 388-89; *Bejil*, 269 F.3d at 479. It is equally true that *Bejil* states:

> In this Circuit, precedent establishes that where the union and employer discuss an issue, the result may be custom or practice, even if the collective bargaining agreement is silent on the issue.

Bejil, 269 F.3d at 479. Nevertheless, the defendant is correct that no case from the Fifth Circuit precludes a finding of custom or practice when the union and the employer never discuss the issue and the CBA is silent on the point.

In *Bejil*, the court was addressing the undisputed facts before it, which reflected that the employer and the union had addressed the issue of

compensation for the time required to don and doff protective covering on several occasions. *Bejil*, 269 F.3d at 479. The court relied on *Hoover* for the proposition that the Fifth Circuit "had found a practice or custom where the employer refused the union's demand to pay for clothes-changing time, and the collective-bargaining agreement did not mention the issue." *Bejil*, 269 F.3d at 480, *citing Hoover v. Wyandotte Chem. Corp.*, 455 F.2d 387, 389 (5th Cir. 1972). Neither *Bejil* nor *Hoover*, however, addressed the issue whether discussion between the union and the employer is a necessary predicate to the application of § 203(o).

The plaintiffs contend that genuine issues of material fact exist because the employees did not know that time spent changing clothes could be compensable under certain circumstances. These facts, however, are not material to the question whether a custom or policy exists under the relevant CBAs. There is no dispute that the employees at the facilities were covered by bona fide CBAs that addressed compensation, albeit not specifically for changing clothes. There is also no dispute that the employees covered by these CBAs were not paid for time spent changing clothes at the beginning or the end of each shift. The fact that the union representatives or employees may have been unaware of their legal right to payment for certain time spent donning and doffing protective gear does not bear on the question whether the employer had a policy of not paying its employees for time spent engaged in such activities. *See Turner*, 262 F.3d at 227 ("The fact that plaintiffs may possess a general, antecedent right under the FLSA to have change

time included in compensable hours worked, therefore, is simply irrelevant to the logically subsequent question whether a 'custom or practice' of non-compensation existed, thereby triggering § 203(o)'s provision mandating that change time covered by that 'custom or practice' be excluded from compensable hours worked.").

The two Circuits that have specifically addressed the issue have held that a showing that a union and the employer affirmatively discussed the change issue in formal collective bargaining negotiations is not required to invoke application of § 203(o). The facts in the present case are identical, in all material respects, to those before the court in *Anderson*. It is significant that the court in *Anderson* was bound by the same Fifth Circuit precedent relied upon by the plaintiffs in this case. The court follows *Anderson* and concludes that no genuine issues of material fact exist on this point. As such, the court recommends that the defendant's first motion for summary judgment (#90) be granted.

5. Conclusion

For the foregoing reasons, the court recommends that the defendant's first motion for summary judgment (#90) be granted. The court also recommends that the plaintiffs' motion to enter judgment under Rule 54(b) (#218) be granted. There is no just reason for delay, and this court recommends the entry of final judgment dismissing all of the opt-in plaintiffs' claims for overtime compensation for time spent donning and doffing protective gear at the beginning and end of the

plaintiffs' shifts at the defendant's unionized facilities. The undersigned further recommends that the balance of the case be administratively closed, and all other pending motions be denied as moot, but without prejudice to re-urging should the case be re-opened in the future.

A party's failure to file written objections to the findings, conclusions and recommendations contained in this Report within ten days after being served with a copy shall bar that party from *de novo* review by the district judge of those findings, conclusions and recommendations and, except on grounds of plain error, from appellate review of unobjected-to factual findings and legal conclusions accepted and adopted by the district court. *Douglas v. United States Auto. Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996) (en banc).

SIGNED this 25th day of August, 2008.

/s/
CHARLES EVERINGHAM, IV
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

[ENTERED AS EXHIBIT 2 TO PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT: SEPTEMBER 14, 2007]

CORLINE ALLEN, ET AL.	§
PLAINTIFFS,	§
	§
VS.	§
	§
MCWANE, INC.,	§
DEFENDANT.	§

CIVIL ACTION NO. 2-06CV-158 (TJW)

JURY DEMAND

DECLARATION OF DENNIS W. JACKSON IN SUPPORT OF PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pursuant to 28 U.S.C. § 1746, I declare that:

> "My name is Dennis W. Jackson. I am a resident of Anniston, Alabama. I am over the age of twenty-one (21) years, am competent to testify, and state that the following is of my own personal knowledge, true and correct."

"I am employed as a forklift operator for the Defendant, McWane, Inc. at McWane, Inc.'s division, M&H Valve Company, located in Anniston, Alabama. I have been employed at this facility since 1997. Myself and other employees at this facility are, and have been at all relevant times, represented for the purposes of collective bargaining by the Glass, Molders, Pottery, Plastics and Allied Workers International Union (AFL-CIO, CLC) and its Local Union 324, (hereinafter, "the Union"). I am and have been involved in the Union's collective bargaining agreement negotiations for several years and, in fact, took part in and negotiated the collective bargaining agreement which has the effective dates of October 11, 2003 through October 12, 2007."

"Neither I nor any other Union representative has ever raised, during any collective bargaining agreement negotiation or other Union-management meeting, the issue of compensability and/or non-compensability of pre- and post- shift clothes changing involving the donning and doffing of personal protective equipment. McWane corporate representatives have not given notice of same during any collective bargaining agreement negotiation or other Union-management meeting."

"At my facility, employees don and doff required personal protective equipment, which can include: hard hats, earplugs, safety glasses with side shields, prescription safety glasses with side shields, gloves, aprons, rain gear, paper suits, rubber steel-toed boots, steel-toed boots or steel-toed shoes with metatarsal guards, heat jackets, flame-resistant jackets, disposable coveralls, face shields, spats, back braces, wrist braces, aluminized clothing, metatarsal shoes, paper masks, flame retardant hoods, flame retardant sleeves, flame retardant leggings, cutter shirts, respirators, helmets, and chaps. This personal protective equipment is expressly required by McWane, Inc., company policy, procedures and rules and is required by law."

"Prior to this lawsuit, I did not know that pre- and post- shift clothes changing involving the donning and doffing of personal protective equipment was compensable under certain circumstances as provided by law."

"Had I known of that right, and known that McWane was required to pay me for changing clothes involving the donning and doffing of personal protective equipment, I would have raised these issues with management in the collective bargaining agreement

negotiations. In fact, however, I did not know either of these things at the time I participated in negotiating the collective bargaining agreements for my facility and did not raise the issue of compensation for donning and doffing personal protective equipment. At no time was the issue of non-compensation for clothes changing involving the donning and doffing of personal protective equipment discussed, understood or accepted."

"I have read the Declaration of Ray McClay which he signed on August 21, 2007 attached to the Defendant's First Motion for Summary Judgment pursuant to 29 U.S.C. §203(o). Ray McClay did not begin working at M&H Valve Company until the year 2004. The current collective bargaining agreement between the Union and the Defendant McWane, Inc. which I took part in negotiating, became effective on October 11, 2003, before Ray McClay came to work at M&H Valve Company. To my knowledge, Ray McClay had no involvement whatsoever in negotiating the current collective bargaining agreement which has effective dates of October 11, 2003 through October 12, 2007. Because Ray McClay did not come to work at M&H Valve Company until after the current collective bargaining agreement went into effect and had no

> involvement in negotiating the current collective bargaining agreement, I do not believe he could have any personal knowledge of the matters set forth in Paragraphs 8 and 9 of his Declaration."

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 9/12/, 2007.

/s/

DENNIS W. JACKSON
PRESIDENT/UNION CHAIRMAN
Glass, Molders, Pottery, Plastics and
Allied Workers International Union
(AFL-CIO, CLC) Local Union 324